Supreme Court, U.S.
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No. 01-785

In The
Supreme Court of the United States

JIMMY SEARLES,

Petitioner,

v.

DURWARD A. VAN BEBBER, Administrative Chaplain, Hutchinson Correctional Facility,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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42 U.S.C. § 1997e ..... *passim*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. ARGUMENT

A. The State Agrees that the Circuit Courts Are Split on this Issue.

In its Response, the State of Kansas agrees with Petitioner that there is a split of authority among the Circuit Courts on whether a plaintiff can recover damages for a First Amendment claim under § 1997e(e) without a showing of physical injury. Some circuits generally agree with the Tenth Circuit's position that a physical injury is required for First Amendment violations under § 1997e(e). *See Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002); *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998); *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000).

Others, including the Seventh and Ninth Circuits, refuse to require a showing of physical injury in order for an inmate to recover damages for an inmate's First Amendment claims. *See Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999) (holding that section 1997e(e) does not bar claims for nominal damages where such relief was sought solely for the First Amendment violation); *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998). Indeed, earlier this month, the Ninth Circuit held to this position. *See Oliver v. Keller*, No. 00-15849, 2002 WL 826893, at *3 n.5 (9th Cir. 2002).

The Fifth Circuit recently acknowledged this split among its sister courts:

> We decline to reach this issue. . . . We have not considered the application of the PLRA to constitutional violations usually unaccompanied by

> physical injury, such as First Amendment retaliation claims, privacy claims, and equal protection claims. The courts of appeals have reached different conclusions regarding whether the PLRA constitutionally may eliminate nominal and punitive damages for First Amendment and privacy violations.

Oliver v. Scott, 276 F.3d 736, 747 n.20 (5th Cir. 2002). Through these different conclusions on an important and recurring issue, the Circuit Courts cry out for direction from this Court.

Despite its concession, the State argues against certiorari by contending that because the majority of the Circuit Courts have ruled the same way as the Tenth Circuit, there is no reason for the Court to review the decision here. However, as noted previously, the issue here – whether § 1997e(e) requires a showing of physical injury for an inmate to recover damages for a First Amendment claim – has not been conclusively resolved. Four circuits have determined the issue in one manner; two follow a different interpretation. Left without any guidance from this Court, it is possible that the remaining Circuit Courts that have not resolved this issue will split on the issue as well.

The State complains that inmates can be particularly litigious. This is another reason why the Court should resolve this circuit split. The issue of damages under § 1997e(e) in the absence of physical injury will arise in scores of inmate lawsuits of constitutional concern. This is even more likely in cases like this one, where an inmate's right to worship as he wishes is circumscribed. In such cases, physical injury is unlikely to occur. The lower courts

will benefit by having what the standard is when handling these countless claims.

Failing a determination that there is split among the circuits sufficient to warrant granting certiorari, Petitioner renews his request that the Court grant certiorari because a statute that precludes redress for First Amendment constitutional violations without physical injury is unconstitutional. *See Mason v. Schriro*, 45 F. Supp. 2d 709 (W.D. Mo. 1999). The State did not address this argument, so Petitioner offers nothing more in support in this Reply.

B. The State Is Not Entitled to Review of the Issue on Punitive Damages As It Has Failed to File its Cross-Petition for Certiorari in a Timely Fashion.

The State seeks review of the Tenth Circuit's ruling that nominal damages alone can provide a basis for punitive damages under § 1997e(e). Petitioner did not seek review of this issue. As the State seeks to change the judgment of the Tenth Circuit, it should have filed a cross-petition for certiorari. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994) ("A cross-petition is required, however, when the respondent seeks to alter the judgment below."). Furthermore, to the extent that Respondent's Response to Petitioner's Petition for Certiorari is considered a cross-petition, Respondent did not file it within 30 days after this case was docketed. Supreme Court Rule 12.5. For these reasons, the Court should not permit review of this issue.

II. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for a writ of certiorari to resolve the split of authority in the Circuit Courts on the issue of damages under § 1997e(e) in the absence of physical injury.

Respectfully submitted,

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